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No. _____

Supreme Court, U.S.
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in the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

Gerry D. Dickens,
Petitioner,

v.

United Parcel Service, Inc., John Maldonado and C.E. Roarke,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner's Application for a Writ of Certiorari

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QUESTION PRESENTED

Whether, consistent with the Due Process Clause of the Fifth Amendment, the United States Court of Appeals for the Fifth Circuit may decide this case relying upon matters outside of the proper trial court record by referring to a transcript from an earlier mistrial of the case which was never admitted in the second trial.

PARTIES

1. Plaintiff GERRY D. DICKENS, Appellee and Petitioner.

2. Defendant UNITED PARCEL SERVICE, INC. ("UPS"), Appellant and Respondent.

3. Defendant JOHN MALDONADO, Appellant and Respondent.

4. Defendant CURTIS E. ROARKE, Appellant and Respondent.

5. Attorneys for Plaintiff:

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   b. Glen M. Boudreaux
      David Scott Curcio
      Kirklin, Boudreaux & Leonard

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The unpublished opinion of the Fifth Circuit Court of Appeals dated, March 6, 1992, is included in the Appendix beginning at page A-1. The order denying rehearing by the court on April 15, 1992, is also included in the Appendix at page B-1. Additionally, various portions of the "tainted" mistrial transcript as well as various portions of the actual trial transcript, and UPS' Brief, are included in Appendices C through F.

JURISDICTION

The opinion and judgment of the Fifth Circuit was entered on March 6, 1992, and a timely motion for rehearing was overruled on April 15, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1), and the petitioner would especially point to the fact that the Fifth Circuit has totally

departed from the accepted and usual course of judicial proceedings so as to require an exercise of this Court's power of supervision.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part,

> "no person shall be . . . deprived of life, liberty, or property, without due process of law".

U.S. CONST. amend. V.

STATEMENT OF THE CASE

The question in this case is whether, consistent with the Due Process Clause of the Fifth Amendment, a federal appellate court may render its opinion in the case by reliance upon a transcript from an

earlier trial between these parties which resulted in a hung jury and thus a mistrial. While the Court of Appeals apparently relied upon both the tainted transcript as well as the actual transcript from the second trial, it is clear the Court at best improperly "meshed" the two transcripts together to create a unconstitutional environment of "facts" resulting in a denial of due process to the petitioner.

Notwithstanding this unconstitutional mesh of facts, from the court's opinion, we see that certain facts underlying this controversy are fairly straightforward.

1. The petitioner-plaintiff, Gerry D. Dickens, sued the defendants-respondents, United Parcel Service (UPS), C.E. Roarke, and John Maldonado in Texas state court for false arrest,

malicious prosecution, intentional infliction of emotional distress and violation of his civil rights under 42 U.S.C. § 1983. Respondents then removed the case to the Federal District Court for the Southern District of Texas. Jurisdiction was based upon 28 U.S.C. § 1331, 1343.

2. The first trial of this cause resulted in a hung jury and the district court declared a mistrial.

3. Following a second trial, the jury returned a verdict for the plaintiff on all claims and awarded him the sum of $6,400,000. The trial court, Judge Kenneth Hoyt, subsequently signed a judgment awarding

petitioner Dickens $400,000 in actual damages, $6,000,000 punitive damages, and attorney's fees.

4. All post-trial motions were denied and attempts to levy execution were met with a flurry of legal maneuvers which are of no moment to the instant application.

5. The respondent took an appeal to the United States Court of Appeals for the Fifth Circuit, which following briefing and oral argument, reversed the judgment of the district court and "dismissed" the plaintiff-petitioner's case.

6. While the Court of Appeals apparently used the wrong standard to review the judgment,

it amazingly also used the wrong "record", for the court's opinion is laced with crucial references to the tainted "mistrial transcript" which was never even admitted into evidence in the second case at all.

REASONS FOR GRANTING THE WRIT

Both Federal Rule of Appellate Procedure 10 (FRAP 10) as well as the Due Process Clause of the Fifth Amendment require that a federal court of appeals in reviewing actions of a district court look only to the actual record of the case which is being reviewed. In the instant case, the opinion of the Fifth Circuit is permeated with crucial references to the tainted mistrial transcript. Indeed, it seems as if magically the actual trial

transcript became enmeshed into the bogus mistrial transcript and thus the reviewing court not only violated the cardinal rule of appellate review, i.e., that only the actual record of the case be employed to determine the facts of the case (see FRAP 10) but it also denied to this litigant due process of law by not following what the rule requires for an appellate review of the "record".

I. The Fifth Circuit Opinion Relied Upon The Tainted Mistrial Transcript.

A.) The Mercedes 190 error

The court's obvious reliance on the bogus transcript is found in its erroneous references to a certain Mercedes 190 automobile. At the second trial, the defendants fueled a theory that the petitioner had engaged in theft and that a certain "getaway" car was involved. The

defendants' theory involved a "red Corvette". The linchpin of the defendants trial strategy involved linking the petitioner somehow to a "red Corvette". The point is that the red Corvette theory was totally that of the defendants-respondents in the second trial which resulted in the final judgment against them. At trial, the defendants-respondents even questioned the petitioner about his knowledge of an alleged conspirator driving a red Corvette (R. XI, 157 - 159; Ap. D). The defendants-respondents even referred to the red Corvette theory twice in its final argument (R. XIII, 30, 33; Ap. E) and even in its brief to the Fifth Circuit (see Appellants Brief, p. 5, 15; Ap. F).

In its opinion, however, the Fifth Circuit severely criticized the petitioner's counsel for reference to the

"red Corvette" evidence (Op. 5, n. 4; Ap. A-9).

Amazingly, the Fifth Circuit's opinion has somehow transformed the red Corvette into a Mercedes 190. The crucial error was that there is no mention whatsoever of a Mercedes 190 found anywhere in the actual trial transcript under review.

The mystery of where the Mercedes 190 came from is solved by looking to the mistrial transcript. Not surprisingly, in the tainted mistrial transcript, abundant references are made to the mysterious Mercedes 190 as being the car driven by the alleged accomplice Williams - as demonstrated by the cross-examination of the star witness for the defendant, Mr. Maldonado:

> Q: What else led you to suspect Scooter Williams?

A: He lived a very high standard of living. He -- when he eventually left the company, he drove a Mercedes, 190 Mercedes, and UPS paid well at that time, but not enough to buy a 190.

(See mistrial transcript - Record V page 381; Ap. C).

There is simply no mention of a Mercedes 190 in the record of the second trial at all, and it is imperative to note that the mistrial transcript was never admitted in the second trial.

Ironically, at page 5 of the Fifth Circuit's opinion, the court at footnote 4 even angrily chastises the petitioner by saying:

> "Again, counsel for plaintiff-appellee attempts to mischaracterize the evidence. He suggests

> at oral argument that Scooter Williams was well known at UPS as driving a Red Corvette and that it is incredible that he fled the scene at 8:00 a.m. in the middle of a shift change without being observed. In fact the record demonstrates that while employed by UPS, Scooter drove a Mercedes Benz 190 sedan (emphasis ours) and therefore that is the type of car which he would be known as driving by Westpark facility personnel...."

(Op. 5, n. 4; Ap. A-9).

Again, unfortunately, it is the Fifth Circuit itself which was mischaracterizing

the record because it was relying upon the tainted mistrial transcript.

B.) The Admitted "Facts" Error

While the court purports to rely on only facts "admitted" by the petitioner (see Op. p. 3, n. 1; Ap. A-4) and on uncontroverted evidence (see Op. p. 6; Ap. A-11), the court, by looking outside the record and after concededly being angered by what it perceived as petitioner counsel's mischaracterization of the record, then summarily viewed the meshed record with every presumption against the petitioner rather than properly reading all factual inferences in favor of the jury's verdict.

While the court viewed the petitioner's activity as "suspicious" and as being "clearly comported with criminal activity" (Op. p. 7; Ap. A-12), the jury

concluded that petitioner's conduct was routine. In fact, the Court, using an improper record, then simply reviewed the meshed facts and disagreed with the jury. Thus, the court totally took the wrong road using the wrong record and reached the wrong conclusion.

II. The Court Of Appeals Violated Both FRAP 10 And Due Process Of Law By Its Improper Review Of This Case.

The Due Process Clause, like its forbearer in the Magna Charta, ".... was `intended to secure the individual from the arbitrary exercises of the powers of government', Hurtado v. California, 110 U.S. 516, 527 (1884) (quoting Bank of Columbia v. Okely, 4 Wheat. (17 U.S) 235, 244 (1819))." Daniels v. Williams, 474 U.S. 327, 331 (1986). "The touchstone of due process is protection of the

individual against arbitrary action of government, Dent v. West Virginia, 129 U.S. 114, 123 (1889)." Wolff v. McDonnell, 418 U.S. 539, 558 (1974). This Court's decisions under the Due Process Clause reflect this constitutional imperative to protect litigants against arbitrary deprivation of life, liberty or property.

This Court has invalidated vaguely worded state laws, for example, because they leave the execution or application of the law to the standardless discretion of state officials, judges or juries. E.g., Kolender v. Lawson, 461 U.S. 352, 358 (1983) (invalidating statute that "vests virtually complete discretion in the hands of the police"); Giaccio v. Pennsylvania, 382 U.S. 399, 402-03 (1966) (invalidating a law that "leaves judges and jurors free to decide, without any legally fixed

standards, what is prohibited and what is not"); Smith v. Goguen, 415 U.S. 566, 574 (1974) (vagueness doctrine rooted primarily in need of the "legislature [to] establish minimal guidelines to govern law enforcement'). Similarly, this Court has refused to afford agency officials "unlimited discretion" to exercise their statutory authority, insisting on a statement of reasons that "articulate[s] [a] rational connection between the facts found and the choice made." Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 165, 168 (1962); see Goldberg v. Kelly, 397 U.S. 254, 271 (1970); Wichita R. & Light Co. v. PUC, 260 U.S. 48, 57-59 (1922).

Most recently, in Pacific Mutual Life Insurance Co. v. Haslip, this Court affirmed that a state may not delegate either to judges or juries unlimited

discretion to award punitive damages. 111 S.Ct. 1032 (1991). "One must concede that unlimited jury discretion - or unlimited judicial discretion for that matter - in the finding of punitive damages may invite extreme results that jar one's constitutional sensibilities." 111 S.Ct. at 1043 (emphasis added). "As long as the discretion is exercised within reasonable constraints, [however,] due process is satisfied. Id. at 1044. As several state and federal courts have ruled in the months since Haslip was decided, punitive damages in the absence of such reasonable constraints violate the Due Process Clause. See Garnes v. Fleming Landfill, Inc., 413 S.E.2d 897, 908 (W. Va. 1991) (invalidating award of punitive damages where constraints "were neither meaningful nor adequate under the standards established in Haslip"); Mattison v.

Dallas Carrier Corp., 947 F.2d 95, 101-08 (4th Cir. 1991) (South Carolina); Johnson v. Hugo's Skate-way, 949 F.2d 1338, 1350-52 (4th Cir. 1991) (Virginia). See also Haslip, 111 S.Ct. at 1045 n. 10 ("distinguish[ing] Alabama's system from the Vermont and Mississippi schemes about which Justices [previously] expressed concern...").

While one may reasonably argue as to what "process is due" pursuant to the Due Process Clause when the rules themselves do not clearly answer that question, (see Cleveland Board of Education v. Londermill, 470 U.S. 532 (1985)), here, however, the rules of fairness are set out clearly in FRAP 10 - only the record of the actual case itself is to be reviewed by the appellate court. This surely makes sense! If a court can look outside of the record itself for its facts, then the

opinion itself is flawed. It would be no different than having a law clerk go on a fact finding mission to develop a record unknown to the parties. The error would be that the parties have a right to a correct record. Thus in Kennedy v. Great Atlantic & Pacific Tea Co., 551 F.2d 593 (5th Cir. 1977), the court reversed when court personnel made its own view of the accident scene. Likewise in Price Brothers v. Philadelphia Gear Corp., 629 F.2d 444 (6th Cir. 1980), the same error was found when the judge in a bench trial allegedly sent his law clerk to view the site of the alleged wrong.

The common theme in these cases is that there must be a record of the proceedings on which the court based its judgment and a court is not free to arbitrarily create its own record. This same fundamental rule of law, that

documents and exhibits not filed of record in the trial court may not be considered on appeal, is applied in the state courts. See Martinez v. Valencia, 824 S.W.2d 719 (Tex. App.--El Paso 1992, no writ); Skrypek v. Mazzocchi, 590 N.E.2d 990 (Ill. 1992) (matters outside the record may not be considered on appeal) in accord; Zapffe v. Srbeny, 587 N.E.2d 177 (Ind. 1992).

Thus, the rules of appellate review limit the reviewing court to the actual record, not to a meshing of matters in the record and those that are not. To hold otherwise is to legally mandate pure judicial arbitrariness - to salute the will of men rather than the rule of law. The very purpose of the Due Process Clause is to prevent governmental arbitrariness. (See Hurtado, supra). When a court does not follow its own rules or when the court creates a new environment of facts by

going outside an appellate record, judicial arbitrariness must follow.

There can be no serious contention that the petitioner lost a right secured by the federal rules, i.e., a right to have his judgment for $6.4 million dollars reviewed by a court following the actual record of the case. To hold otherwise is merely to salute pure governmental arbitrariness. See Goldberg v. Kelly, 397 U.S. 254 (1970) (where welfare benefits could not be terminated without due process); see also, Perry v. Sindermann, 408 U.S. 593 (1972) (where even "mutual understandings" between individuals rose to the level of due process protection which could not be deprived without a fair hearing).

Is the hearing fair merely because there was one? Certainly not! Like in criminal cases, due process is violated

when the indigent cannot afford a transcript upon which to perfect their appeal. See Griffin v. Illinois, 351 U.S. 12 (1956). The same is true when a reviewing court goes further and creates a transcript that is not the official record of the case. If the poor are denied due process by being denied the use of the proper trial transcript, it certainly follows that any litigant is denied due process by a reviewing court that creates its own "transcript" by going outside the record. It was the trial transcript in Griffin which Mr. Justice Black found was at the very heart of the appellate process, especially since the government itself had established the right of appeal and had limited arguments only to those matters contained in that very trial transcript.

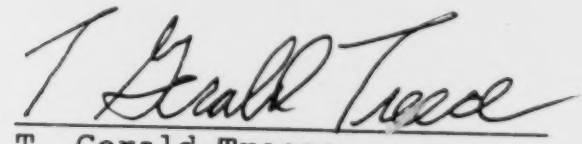
The due process limitation against governmental arbitrariness is clearly violated in this case. The use of the wrong record, the use of the unconstitutionally meshed record, and the court's unfair attack on petitioner's counsel because he was in fact using the correct record all smack of due process violations. To deny the writ of certiorari is merely to bless that very arbitrariness which the Due Process Clause was designed to prohibit.

The petitioner seeks only that which the law already requires - review by an appellate court employing only those matters properly in the record. Thus the petitioner requests that the writ be granted and the Fifth Circuit be ordered to consider this case under the true and correct record of the proceedings.

CONCLUSION

The petition for a writ of certiorari should be granted and the case remanded to the Fifth Circuit for a fair hearing using the proper trial court record.

Respectfully submitted,

By: 

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KKN103/PLDG/DICKENS2.DSC

(APPENDIX A)

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 90-2935

GERRY D. DICKENS

(Plaintiff-Appellee)

v.

UNITED PARCEL SERVICE, INC.
JOHN MALDONADO AND C.E. ROARKE

(Defendants-Appellants)

-------consolidated on appeal with-------

No. 91-2102

GERRY D. DICKENS

(Plaintiff-Appellee)

v.

UNITED PARCEL SERVICE, INC.

(Defendant-Appellant)

Appeals from the United States District Court for the Southern District of Texas
(CA-h-86-4457)

(March 6, 1992)

Before GARZA, Reynaldo G., and GARWOOD, Circuit Judges, and SCOTT, District Judge.*

SCOTT, Nauman S., District Judge:**

* Senior District Judge of the Western District of Louisiana, sitting by designation.

** Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Following his arrest for theft of shipped property, plaintiff, Gerry D. Dickens (Dickens), sued defendants-appellants United Parcel Service (UPS), C.E. Roarke (Roarke) and John Maldonado (Maldonado) in Texas state court for false arrest, malicious prosecution, intentional infliction of emotional distress and violation of his civil rights under 42 U.S.C. § 1983. Appellants then removed the case to the Federal District Court for the Southern District of Texas. After a mistrial, a second trial was held before Judge Hoyt in which a jury returned a verdict for the plaintiff on all claims for $6.4 million. Judge Hoyt subsequently signed a judgment that awarded Dickens $400,000 in actual damages, $6,000,000 in punitive damages, and attorney's fees. Judge Hoyt denied defendant's post-trial motions and signed a writ of execution for

Dickens to seize $1,400,000 of UPS' equipment. UPS brought an emergency motion to quash the writ, but the court denied the motion and set a replevy bond at $1,500,000. UPS brought a motion to reconsider the denial of the motion to quash, which was denied. Dickens then seized a number of UPS' trucks under this writ of execution. This appeal followed. This court has consolidated the appeal of Dickens' judgment with the appeal of the motion to quash. We find the District Court erred in permitting this case to go to the jury. We reverse.

FACTS

Appellant UPS operates the Westpark Facility,[1] a distribution center, in

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[1] We shall focus only on those facts which Dickens admitted in his testimony or in argument -- where he was and what he did at the time of the

Houston, Texas. UPS Loss Prevention and Delivery Information Department began investigating a large number of lost packages from the Westpark facility. It was determined that many of these lost packages were C.O.D. shipments of gold jewelry being shipped to the Sharpstown mall. Subsequent investigation determined that the losses were in fact thefts which were occurring at the Westpark pre-loading dock, the areas where large trailers are emptied and their contents sorted. Loss prevention department member Juan E.

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incident. These facts are not controverted by plaintiff's counsel's mischaracterizations and irrelevant accusations such as: that UPS' investigation was a conspiracy; that the officers could not recognize Dickens or see what he did at a distance of 130 feet (Dickens confirmed their observations); and failure to perform tests to prove facts which were already admitted.

Maldonado[2] and off-duty Houston Police Department Officer Curtis E. Roarke established a surveillance point approximately 130 feet away from the loading dock in an adjacent building. They drilled two dime size peep holes through a metal door to observe the dock.

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[2] Counsel for appellee maliciously mischaracterizes Mr. Maldonado in the following manner:

> When you read the record about Maldonado what you are going to find is that Maldonado's one of these guys that was run out of the and [sic] I don't speak factually, but, but, ah, but sort of ah [sic] my belief here, was that Maldonado was a character who was run out of the criminal justice system, his type was run out of the criminal justice system when Miranda rights and things like that came into place and he's popped up again in private surveillance.

In fact, the record reflects that Maldonado was a UPS employee that worked his way up through the ranks and had never applied for any law enforcement position other than simply inquiring about employment as a Houston reserve police officer.

On November 5, 1985 Maldonado and Roarke took their position at the surveillance point. At approximately 8:00 a.m. the two observed Dickens, with whom Maldonado was familiar, checking empty trailers and removing plastic wrapping from the area of the loading dock. To prevent theft, UPS had issued orders to all employees that no hourly wage employees should be on the docks.[3] At one point, they observed a package being kicked or tossed out of the building on to the loading dock. Dickens immediately came out of the building, picked up the package, wrapped it in plastic and placed the package in or behind trailer F at the loading dock. A short time later, Dickens removed from trailer F a bundle of plastic

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[3] This order was overridden by Mr. Savanah who ordered Dickens to work on the dock. Savanah was terminated for this action.

which contained the box he had picked up and placed it in trailer E. He then departed the facility for the day.

The two officers remained in position watching the trailers. Later in the morning another man arrived at the loading dock. Maldonado recognized the man as Thomas "Scooter" Williams (Williams), a former UPS worker and high school acquaintance of Dickens. After looking around and lying under a trailer, Williams opened trailer E and removed a wad of plastic material. Maldonado and Roarke then left their position and called for Williams to stop. Instead, Williams dropped the wadded plastic which was found to contain two packages and fled the scene in a red Chevrolet Corvette parked

nearby.[4] The packages were opened and found to contain gold earrings destined for the Sharpstown Mall.

The following day, November 6, 1985 Maldonado and another UPS loss prevention officer questioned various UPS employees. They interviewed Dickens and then placed him under arrest. Following the placement of Dickens in handcuffs, he was escorted through the building into the parking lot where after a brief wait he was placed in

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[4] Again, counsel for plaintiff-appellee attempts to mischaracterize the evidence. He suggests at oral argument that Scooter Williams was well known at UPS as driving a Red Corvette and that it is incredible that he fled the scene at 8:00 a.m. in the middle of a shift change without being observed. In fact the record demonstrates that while employed by UPS, Scooter drove a Mercedes Benz 190 sedan and therefore that is the type of car which he would be known as driving by Westpark facility personnel. Further the record shows that the Corvette in which he escaped was parked in an adjacent lot, and that this activity occurred at around 10:00 a.m., fully two hours after the loading crew had departed for the day.

a Houston Police patrol car for transportation to the booking facility. During this period many fellow UPS employees saw Dickens in handcuffs. Dickens has not alleged he was physically harmed by the officers. After Dickens was booked, he was called by Williams who later arrived at the police station with an attorney for Dickens.

Based on evidence Maldonado and Roarke acquired, Dickens and Williams were both prosecuted by the Houston District Attorney. Dickens was indicted by the Harris County grand jury. At trial however, both Dickens and Williams were acquitted. After his acquittal Dickens filed the lawsuit which forms the basis for this appeal. The lawsuit was tried twice. The first trial resulted in a hung jury. The second time the jury returned the verdict appealed here.

DISCUSSION

I. The appellants had probable cause to arrest Dickens.

We believe the uncontested evidence presented at trial shows that Maldonado and Roarke had probable cause November 6, 1985 to effect the arrest of Dickens. As the trial court correctly charged the jury, Dickens was required to prove the absence of probable cause by "positive, clear and satisfactory" evidence. Probable cause is defined as "a reasonable ground for belief of guilt." Brinegar v. United States, 338 U.S. 160, 175 (1949). Under Texas law, probable cause is determined by whether the arresting officers had "reasonable grounds from the facts known to him . . . to believe that the accused was guilty." Moran Utility Co. v. Childs, 392 S.W.2d 536, 538 (Tex.Civ.App. Beaumont 1965). Based on

their observations of activities which Dickens admits, combined with what they knew already, we find the officers had probable cause. Because the facts which indicate the existence of probable cause were not in dispute, Texas law mandates that this issue should have been decided as a matter of law by the court. Parker v. Dallas Hunting and Fishing Club, 463 S.W.2d 496, 500 (Tex.Civ.App.--Dallas 1971, no writ).

Both officers knew that thefts were being conducted at the Westpark facility reloading dock. Both officers saw Dickens' admitted behavior which clearly comported with criminal activity. Dickens admits that he picked up a box, wrapped it in plastic and placed the box in trailer F. Dickens later returned and transferred the wrapped box to trailer E. At trial Dickens attempted to show that the box he

placed in trailer E was empty, and by using expert testimony that the officers could not identify him reliably. Such evidence was irrelevant since Dickens admitted that behavior on which Maldonado and Roarke based their suspicion.

Further support for reasonable cause is found in the involvement of Scooter Williams. After seeing Dickens deposit a plastic wrapped box in trailer E and departing, the officers saw Williams arrive, open the trailer and remove a plastic wrapped box. When opened, both the box Williams picked up and another still in the trailer, contained gold jewelry destined for the location for which jewelry had been repeatedly stolen from in the past. No other boxes were found in the trailer. It was therefore perfectly reasonable for the officers to presume that the box the officers had seen

Dickens place in trailer E was the box Williams had taken, and that Dickens was attempting to steal the box. Moreover, a social relationship from high school between Williams and Dickens was known by Maldonado to have preceded their co-employment at UPS. This further supports the officers' belief that Williams and Dickens might be involved in a criminal conspiracy. Thus, considering the evidence in the light most favorable to Dickens, we find that reasonable and impartial minds could not have found that Maldonado and Roarke lacked probably cause for Dickens' arrest.

The appellee contends that the fact that no fingerprints were lifted from the two jewelry boxes to compare them with Dickens' exemplars on file with UPS supports a finding of lack of probable cause. However, such an argument neglects

Dickens' admission that he handled the boxes. Similarly, Dickens urges that the testimony of Dr. Merton Flom, a professor of optometry, supports a finding of no probable cause. Flom opined that Maldonado and Roarke could not have seen Dickens' movements on the loading dock and could not have accurately identified him. We deem this testimony to be utterly irrelevant as Flom simply testified that the officers could not have seen those actions which Dickens has admitted.

II. The effect of probable cause on appellee's claims.

Having determined that probable cause existed for the arrest of Dickens, we now turn to the various claims upon which Dickens sued. Probable cause negates Dickens' claim for malicious prosecution, the absence of which is a prima facie element of that cause of action. Akin v.

Dahl, 661 S.W.2d 917, 919 (Tex. 1983), cert. denied, 104 S.Ct. 1911 (1984). The same is true for Dickens' claim under 42 U.S.C. § 1983 for false arrest. Hinshaw v. Doffer, 785 F.2d 1260, 1266 (5th Cir. 1986).

Dickens' suit also claimed false arrest under Texas law and Judge Hoyt instructed that "[i]f probable cause existed for the arrest of plaintiff he has no claim for false arrest and false imprisonment."[5] Under this charge, our finding of probable cause mandates reversal. Appellee's have not alleged any error in this charge and the correctness of the charge is not before the court. Indeed, the existence of probable cause has generally been a bar to liability for

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[5] Texas law refers to the tort of false arrest as false imprisonment and we shall do the same here.

false arrest. As the Supreme Court stated:

> Under the prevailing view in this country a peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved. . . . A policemen's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does.

Pierson v. Ray, 386 U.S. 547, 555 (1967).[6]

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[6] A prima facie case for false imprisonment requires three elements: (1) a willful detention of a person; (2) against the consent of the detainee; (3) a detention without the authority of law. Sears Roebuck & Co. v. Castillo, 693 S.W.2d 374, 375 (Tex. 1985).

Under Texas law, a police officer may arrest, without first obtaining a warrant, "persons found in suspicious places and under circumstances which reasonably show that such persons have been guilty of some felony . . ." Tex. Code Crim. Proc. art. 14.03(a)(1). Texas courts construe the "circumstances which reasonably show" requirement as mandating probable cause to make an

The record is clear that Dickens was arrested only by Roarke, a Houston police officer. Since Roarke was within his rights as a peace officer to arrest Dickens, no liability can exist for Maldonado and UPS.

The final claim which Dickens brought is for intentional infliction of emotional distress as a result of his arrest. To establish a claim for intentional infliction of emotional distress the plaintiff must show: (1) the defendant acted intentionally or recklessly, (2) the

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arrest. See e.g. Johnson v. State, 722 S.W.2d 417, 421 (Tex. Cr. App. 1986).

The arrest of Dickens fell within the mandate of article 14.03(a)(1). Roarke and Maldonado observed in a suspicious place, the loading dock and trailers. The circumstances above related showed probable cause to the officers. Additional suspicion was placed upon Dickens when he was questioned immediately prior to the arrest. Therefore, Roarke's arrest of Dickens was appropriate under article 14.03(a)(1).

conduct was extreme and outrageous, (3) the actions of the defendant caused the plaintiff emotional distress, and (4) the emotional distress suffered by the plaintiff was severe. Tidelands Auto. Club v. Walters, 699 S.W.2d 939, 942 (Tex.App.--Beaumont 1985, writ ref'd n.r.e.). We find that the evidence adduced at trial failed as a matter of law to demonstrate that the defendants' conduct was "extreme and outrageous".

Texas law has not directly addressed the question of law before us. When a suspect is arrested by an officer who has probable cause to believe a crime has been committed, can that arrest be considered "extreme and outrageous" conduct? We believe such an arrest, under the circumstances presented here, as a matter of law, cannot be considered extreme and outrageous. Because Maldonado and Roarke

had probable cause to believe Dickens had committed a crime, arresting him could not be "extreme and outrageous." Although Texas has not explicitly adopted a rule which makes probable cause a defense to a claim of intentional infliction of emotional distress, several courts in other jurisdictions have.[7]

Texas has, however, adopted comment g of the Restatement (Second) of Torts § 46 (1965) which provides: "an actor is never liable for intentional infliction of emotional distress where he has done no more than insist upon his legal rights in a permissible way." Diamond Shamrock Refining and Marketing Co. v. Mendez, 809 S.W.2d 514 (Tex.App.--San Antonio 1991,

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[7] See e.g., Southland Corp. v. Bartsch, 522 So.2d 1053, 1056 (Fl. Ct. App. 1988); Von Stein v. Brescher, 904 F.2d 572, 584 (11th Cir. 1990); Brewster v. Woodward & Lothrop, Inc., 530 F.2d 1016, 1017 (D.C. Cir. 1976).

writ granted). This comment was evidently relied upon by the Florida court of appeals which stated:

> [t]o establish intentional infliction of emotional distress, the conduct as a matter of law must be so outrageous in character and extreme in degree as to go beyond all possible bounds of decency. However, the conduct is privileged and the actor is never liable where he does no more than insist upon his legal rights in a permissible way, even though the actor is well aware that such insistence is sure to cause emotional distress.

Southland Corp. v. Bartsch, 522 So.2d 1053, 1056 (Fl. Ct. App. 1988). The Bartsch court held that the existence of probable cause to make an arrest negated the "extreme and outrageous" requirement for a claim of intentional infliction of emotional distress. Under the facts presented in this case, such a rule is entirely appropriate. Under different

circumstances, an arrest with probable cause may not be conducted in a "permissible way." However, there is no allegation in the present case that the arrest of Dickens was conducted in an inappropriate manner. Dickens was placed under arrest, handcuffed, and escorted out of the UPS building to the parking lot where a patrol car picked him up to transport him for booking. No physical abuse has been alleged, nor does any evidence in the record reflect any occurred. More importantly, there is absolutely nothing which was purposely done to embarrass or unnecessarily advertise Dickens' arrest. The Judgment of the District Court is REVERSED and plaintiff's case is DISMISSED.

(APPENDIX B)

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 90-2935

GERRY D. DICKENS,

Plaintiff-Appellee,

versus

UNITED PARCEL SERVICE, INC., Etc.,
JOHN MALDONADO And C.E. ROARKE,

Defendants-Appellants.

-------Consolidated on appeal with-------

No. 91-2102

GERRY D. DICKENS

Plaintiff-Appellee,

versus

UNITED PARCEL SERVICE, INC., Etc.,

Defendant-Appellant.

Appeals from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING
(April 15, 1992)

Before GARZA, Reynaldo G., and GARWOOD, Circuit Judges, and SCOTT, District Judge.*
PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/S/ Will Garwood
UNITED STATES CIRCUIT JUDGE

* Senior District Judge of the Western District of Louisiana, sitting by designation.

(APPENDIX C)
(Record v. V)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

GERRY D. DICKENS,	.	Docket No. CA-H-86-4457
Plaintiff,	.	
-VS-	.	Houston, Texas
	.	January 25, 1990
UNITED PARCEL SERVICE, INCORPORATED, JOHN MALDONADO, and C.E. ROARKE,	.	Volume II
Defendants.	.	

TRANSCRIPT OF TRIAL BEFORE
THE HONORABLE KENNETH M. HOYT
UNITED STATES DISTRICT JUDGE, and a jury.

APPEARANCES:

For the Plaintiff: By: WILLIAM T. POWELL
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For the Defendant: Fulbright & Jaworski
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Fulbright & Jaworski
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Court Reporter: Connie D. Murden, RPR, CM
4176 West Neck Road
Virginia Beach, Virginia

Proceedings recorded by stenographic means, transcript produced by computer-aided transcription.

small bags here for a while until they started being opened here. Now, when I first suspected Scooter, he was a belt splitter up top and he opened the small bags right there, and what was happening was the small bags were being stacked right there next to him. He would just take the bag and lay it down, and then when the belt slowed down or the packages coming down the belt slow down, he would take one and open it and he would just drop the plastic. And why I first suspected Scooter is because the small bags were there and there were small packages disappearing.

Q. What did you do when you first suspected Scooter?

A. Well, I did two things. I put cameras in the rafters, which never showed anything, and I also put a small, yellow "hazardous material" box at the end of the belt, and when I said that it's an open warehouse and any changes you make are very visible, well, it was very obvious to anybody that had any street sense that the holes that were drilled on the side, there could be a camera in there. So, what I would end up getting is videotapes of bags being put right in front of the holes. I could never see anything.

Q. What else led you to suspect Scooter Williams?

A. He lived a very high standard of living. He -- when he eventually left the company, he drove a Mercedes, a 190 Mercedes, and U.P.S. paid well at that

time, but not enough to buy a 190. He also on several occasions came into the building

(APPENDIX D)
(Record v. XI)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

GERRY D. DICKENS	§	
	§	
vs.	§	CA H 86-4457
	§	Houston, Texas
UNITED PARCEL SERVICE,	§	May 31, 1990
INC., JOHN MALDONADO and	§	9:00 a.m.
C.E. ROARKE	§	

Transcript of Proceedings
Volume III
Before the Honorable Kenneth Hoyt
and a jury

APPEARANCES:

For the Plaintiff:

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For the Defendants:

Mr. Michael Moore
Ms. Nancy Patterson
FULBRIGHT & JAWORSKI
1301 McKinney Street
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Court Reporter:

Ms. Joyce K. Schaefer
Official Court Reporter
515 Rusk, Room 8602
Houston, Texas 77002

that you characterized as no big deal, right?

A Well, yes. I would say so.

Q Who as that supervisor?

A I think her name was Cathy.

Q Is that Cathy Montz?

A Yes, sir.

Q What happened in this situation with Cathy Montz?

A I was assigned to -- okay. There was a book that a lot of items were misplaced and you had to find the box or package that there items went into, and I was assigned to that detail that day. And so when you found, I think this particular one was a book and I couldn't find the box for. So I was wrapping it and she walked

up and she said I wasn't doing something. Well, she said I wasn't doing my job. And I don't know, it was some works said back and forward. I can't remember exactly what. And I was -- later on, I was wrote up for it.

Q And you don't remember really what was said?

A She said that I cursed her and, you know, or something like that and that I didn't responded to her command. And they wrote me up for it.

Q Well, did you curse her during that conversation?

A No, sir, I did not.

Q Not at all?

A No, sir.

Q On November 6, do you recall Mr. Maldonado asking you what

kind of car Scooter Williams drove?

A Yes, I think he -- yes, he did ask me that.

Q Do you remember what you told him?

A I can't remember exactly what I told him.

Q Do you remember when I took your deposition, don't you, Mr. Dickens?

A Yes, sir.

Q If you would look at page 51 of your deposition starting at line 6. Question: "And what did you tell him when he asked you what kind of car Mr. Williams drove?"

Answer: "Pardon me?"

Question: "He asked you what kind of car Scooter Williams drove?"

Answer: "Yes, sir."

Question: "What did you tell him?"

Answer: "At that time I thought he was driving a red Corvette. I heard he was."

Did I read that correctly?

A Yes, sir.

Q Does that refresh your recollection?

Mr. Powell: Optional completeness, Your Honor, before he begins. Line 15.

Question: "Had you ever seen him in a red Corvette?"

What was your answer?

THE WITNESS: "No, sir."

BY MR. MOORE:

Q Let's go on to line 17.

Question: "How did you know he drove a red Corvette?"

Answer: Word gets around. Guys at work." Right?

A Yes, sir.

Q Shortly after your arrest, you began working full-time at 7-up Bottling, right?

A Approximately about a month. Month -- right about a month, yes, sir.

Q And that was the same company you had been working part-time for?

A Yes, sir, it is.

Q You got on full-time with them, right?

A Yes, sir.

Q How long did you work for them full-time?

A If I am not mistaken, full-time employment was from '85 through '86. No, I am sorry. I am sorry. '85 -- I only stayed full-time with 7-Up maybe about a month. And Dr. Pepper Bottling Company bought 7-Up out. And they only kept 17 employees and they had heard I had done such a good job, I was one of the 17 fortunately that was able to go to Dr. Pepper.

Q So how long did you work for Dr. Pepper?

(APPENDIX E)
(Record v. XIII)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

GERRY D. DICKENS	§	
	§	
vs.	§	CA H 86-4457
	§	Houston, Texas
UNITED PARCEL SERVICE,	§	June 4, 1990
INC., JOHN MALDONADO and	§	10:40 a.m.
C.E. ROARKE	§	

Transcript of Proceedings
Volume V
Before the Honorable Kenneth Hoyt
and a jury

APPEARANCES:

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That would be suspicious to me. But I wouldn't have jumped right then, I would have waited, just like they waited. And what happens? Hour, hour and a half later, Scooter Williams shows up, goes right to the trailer. Opens the trailer, grabs the boxes. When they gave chase, he dropped them and ran. Got into a red Corvette, left.

John and Officer Roarke went back to the trailer, found two boxes of jewelry, just like what had been stolen time and time again.

Now, Mr. Powell is a good lawyer, excellent lawyer. When Mr. Maldonado was on the stand, he tried to convince Mr. Maldonado that there were only three trips. If you think about what John

testified to, he consistently testified to four trips. Once he went outside, checked the trailers E through A, put some plastic in behind F, when back in. Walked along picking up bags inside the building. He jumps back out. Puts them in a third time -- that is twice. Third time, a box appears. It falls out, was kicked out, Mr. Dickens jumps down, grabs it, sticks it in F, comes back inside. Fourth time comes back out, puts everything in trailer E. Fourth time comes back out, puts everything in trailer E. Four trips. That is what he testified to every time he has testified.

Officer Roarke, that is right, Officer Roarke didn't know Gerry Dickens' name. When Mr. Powell says he couldn't identify him, that is what he is talking about, didn't

the door to trailer E. That is what Mr. Maldonado testified to. That is what Mr. Roarke testified to. That is what Mr. Maldonado's notes prepared that day say. And what did Mr. Dickens say, yep, sure did. Had a problem with that door.

Saw Mr. Dickens walk around in front of the trailers, within 80 feet of the peepholes. That is what he says he did.

John Maldonado saw Scooter Williams drive off in a red Corvette. What kind of car did Mr. Dickens say Scooter had?

The pictures that are taken that day showed that the angles would allow them to see. That is what they show. No, you can't identify people in these little pictures. Little pictures are, what, three by three? That doesn't mean they couldn't see.

There is an awful lot of detail, an awful lot of detail for two people who couldn't see.

What would the plaintiff have you believe in this case? Well, first of all, have you believe he is an all American boy and a good employee. And to show that, he brought his former supervisor up and he brought an expert up. Of course, the expert interviewed Mr. Dickens, his mom, his sister and his fiancee. He better have got a good story from him. They knew what he was there for. He was there to gather evidence to testify.

(APPENDIX F)

NO. 90-2935

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

GERRY D. DICKENS,
Plaintiff-Appellee,

V.

UNITED PARCEL SERVICE, INC.,
JOHN MALDONADO AND C.E. ROARKE,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Texas, Houston Division, Hon. Kenneth M. Hoyt

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BRIEF OF APPELLANTS

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by Maldonado, because they had engaged in several altercations in the past (R. X: 155; XI: 96-97); also, "Scooter" was known as a flashy dresser who wore a large amount of gold jewelry (R. XI: 155-56). Dickens had known "Scooter" since the seventh grade (R. III: 155), and "Scooter" had been a co-worker with Dickens at U.P.S. (R. XI: 96, 138). In addition, they had been high school classmates and teammates on the track team (R. XI: 95). "Scooter's" father had even been Dickens's agent when he had tried to play professional football (R. XI: 155). Maldonado and Roarke first observed "Scooter" lying underneath the trailer where Dickens had placed the package (R. X: 211, 213; XII: 109, 149). "Scooter" arose, looked furtively left and right, opened the door, reached inside the

trailer, and removed a package (R. XII: 109, 150).

As Maldonado and Roarke came forward, "Scooter" saw them, dropped the package, and fled in his red Corvette (R. XII: 75, 112), despite Roarke's yelling, "Stop, police!" (R. XII: 150). The package "Scooter" dropped was addressed to 7500 Bellaire (Sharpstown Mall) and contained gold jewelry (R. XII: 24, 33, 114-15, 153). Another package containing gold jewelry and addressed to a jewelry store was found in the trailer (R. XII: 23-24, 114-15, 153). The two packages together contained jewelry valued at approximately $2,000 (R. XII: 25).

Suspecting a theft ring, Maldonado and Roarke reviewed the situation with U.P.S. supervisors and waited until the next morning before questioning the U.P.S. employees in the pre-loading area (R. X:

228; XII: 75-76, 118). They questioned several employees and then questioned Dickens (R. X: 43, 109, 123, 176, 228; XII: 77, 119-20, 156). Dickens's answers were found to be less than convincing: he said his job was to clean out the trailers (R. XI: 101, 103), but he had been observed-and admitted

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observed, and Dickens admitted, that he completed his shift and left the facility (R. XI: 106; XII: 109, 149).

A short time later, Maldonado and Roarke observed "Scooter" Williams (a former employee known to wear gold jewelry), underneath the trailer in which Dickens had placed the package. "Scooter" arose, looked suspiciously left and right, opened the trailer door, and removed a package (R. XII: 109, 149-150). As Maldonado and Roarke left their

surveillance position, "Scooter" dropped the package and fled in his red Corvette as Roarke shouted, "Stop, police!" (R. XII: 109-110, 112, 150-151).

Maldonado and Roarke returned to the trailer and found another package as well (R. XII: 23-24, 114-15, 153). The package "Scooter" dropped was addressed to 7500 Bellaire (Sharpstown Mall); the one remaining in the trailer was addressed to a jewelry store (Plaintiff's Ex. E). Both packages contained gold jewelry (R. XII 24-25, 33, 35, 153). On the following morning, Dickens was given the opportunity to exculpate himself, but gave a physically impossible story, *i.e.*, when he put the package in the trailer both the trailer and the package were empty (R. XI: 105, 142-43, 146; XII: 120). These undisputed facts establish a reasonable

ground for believing that Dickens was involved in criminal activity.

One of the cases most frequently cited for its discussion of probable cause is *Draper v. United States*, 358 U.S. 307 (1959). The begrudging acknowledgement in Justice Douglas's dissent poignantly applies to the facts in *Dickens*: "The Court is quite correct in saying that proof of `reasonable grounds' for believing a crime was being committed need not be proof admissible at the trial. It could be inferences from